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No. 94-1141

In the
Supreme Court of the United States
October Term, 1994

BP PERFORMANCE POLYMERS, INC.,
Petitioner,

v.

ETHYL CORPORATION; TRAVELERS INSURANCE COMPANY; LUDGATE INSURANCE CO., LTD.; COMPAGNIE EUROPEENE d'ASSURANCES INDUSTRIELLES S.A.; ASSICURIAZIONI GENERALI, S.P.A.; UTICA MUTUAL INSURANCE COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Does the petition satisfy the criteria for certiorari where, after reversing the district court's ruling on a purely state law issue, the Eighth Circuit Court of Appeals reversed the district court's judgment and remanded the case with directions to enter judgment in plaintiff's favor in conformity with the jury's express findings in favor of plaintiff on each element of plaintiff's claim against defendant?

LIST OF PARTIES

1. Respondent The Travelers Corporation. Ethyl Corporation was insured under a policy issued by The Travelers Indemnity Company and The Travelers Insurance Company. Both companies are subsidiaries of The Travelers Corporation. Additional subsidiaries of The Travelers Corporation include:

    a) The Center for Corporate Health, Inc.;
    b) Conservco, Inc.;
    c) Constitution Plaza, Inc.;
    d) KF Corporation;
    e) The Massachusetts Company, Inc.;
    f) The Plaza Corporation;
    g) The Prospect Company;
    h) Resource Information Management Systems, Inc.;
    i) Travelers Asset Management International Corporation;
    j) Travelers Canada Corporation;
    k) The Travelers Corporation of Bermuda Limited;
    l) Travelers Corporation (U.K.), Ltd.;
    m) Travelers/E.B.S., Inc.;
    n) Travelers Equities Sales, Inc.;
    o) Travelers Health Network, Inc.;
    p) The Travelers Insurance Company of Illinois;
    q) Travelers Insurance Corporation Proprietary, Ltd.;
    r) The Travelers Investment Management Company;
    s) Travelers of Ireland, Ltd.;
    t) Travelers Keystone Fixed Income Advisors;
    u) The Travelers Marine Corporation;

v) Travelers Mortgage Securities Corporation;
w) Travelers Plan Administrators, Inc.;
x) Travelers Realty Investment Company;
y) Travelers Specialty Property Casualty Co. Inc.;
z) Travtech, Inc.;
aa) U. S. Behavioral Health.

Subsidiaries of The Travelers Insurance Company include The Travelers Life and Annuity Company. Subsidiaries of The Travelers Indemnity Company include:

a) The Phoenix Insurance Company;
b) The Charter Oak Fire Insurance Company;
c) The Constitution State Insurance Company;
d) C.S.I., Inc.;
e) The Travelers Reinsurance Company of Bermuda, Limited;
f) The Travelers Lloyds Insurance Company;
g) Bankers and Shippers Insurance Company;
h) Travelers Home & Marine Insurance Company;
i) Travco Insurance Company;
j) First Trenton Indemnity Company.

2. Ethyl Corporation. Ethyl Corporation does not have a parent corporation. Ethyl Corporation has no subsidiaries that have issued shares to the public, and it does not have any affiliates that have issued shares to the public.

3. Utica Mutual Insurance Company. Utica Mutual Insurance Company does not have a parent corporation. Utica Mutual Insurance Company has no subsidiaries, is not owned by any publicly held companies, and does not have any affiliates that have issued shares to the public.

4. Compagnie Europeene d'Assurances Industrielles S.A. Compagnie Europeene d'Assurances Industrielles S.A. is a wholly-owned subsidiary of Petrofina S.A (Brussels). Compagnie Europeene d'Assurances Industrielles S.A. has no subsidiaries, and it does not have any affiliates that have issued shares to the public.

5. Ludgate Insurance Company, Ltd. Ludgate Insurance Company is owned by Ken Randall Associates. Ludgate Insurance Company has no subsidiaries, and it does not have any affiliates that have issued shares to the public.

6. Assicuriazioni Generali, SPA. Assicuriazioni Generali, SPA does not have a parent corporation. Assicuriazioni Generali, SPA's subsidiaries (except wholly-owned subsidiaries) are the following:

Aurora Assicurazioni
Alleanza Assicurazioni
Friuli-Venezia Giulia Assicurazioni "La Carnica"
Agricoltura Assicurzaioni
Navale Assicurazioni
Unione Mediterranea di Sicurta
AdriaVita
AssiBa Societa di Assicurzaioni
Europ Assistance Italia
Edicom
Ediltaro
Crespim
Agricola San Giorgio
Sementi Dotto
Generali France
La Concorde
Compagnie Continentale d'Assurances
La Fédération Continentale

L'Equité
La Lutece
Européenne de Protection Juridique
Europ Assistance S.A.
Compagnie Dakar Saint-Louis
Generali Finances
Generali France et Cie.
S.A.I. des 154/156 Boulevard de la Gare
S.I. du Parc de la Noue
Sotrimlo
Generali Lebensversicherung
Deutscher Lloyd Lebensversicherung
Deutscher Lloyd Versicherung
Dialog Verischerung
Dialog Lebensversicherung
Erste Allgemeine Versicherung
EA Rechtsschutz-Versicherung
Generali Krankenversicherung
Interunfall Allgemeine Versicherung
Munchener Lebensversicherung
Europ Assistance Versicherung
Lloyd-Immobilien
Northern Star Insurance Co.
Europ Insurance Co.
Europa Assistance Insurance
Gefina International
Europ Assistance Holdings
Levensverzekering de Nederlanden van 1870
Schadeverzekering de Nederlanden van 1870
Levensverzekering Eerste Hollandsche
Schadeverzekering Eerste Hollandsche
Eerste Algemene Verzekering
Algemene Holding en Financiering
Beleggingsmaatschappij de Grachten
Graafschap Holland

Verzekeringsgroep de Nederlanden van 1870
Nedasinvest
Transhol
GME Generali-Midi Expansion
Redoze Holding
Lepaka
Nieuw Welgelegen
Caja de Prevision y Socorro
Covadonga
Europ Assistance Espana
Generali Belgium
Les Patrons Réunis
Union des Assureurs
Europaea-Assurance Protection Juridique
Generali Belgium Holding
Generali Belgium Invest
S.A. Immobiliere de la Toison d'Or
Souverain 100
Generali Life
Generali Hellas
Generali Vida
EA-Generali
Erste Allgemeine Versicherung
Generali Allgemeine Lebensversicherung
Generali Versicherung
CA-Generali Versicherung
Europaische Reiseversicherung
Interunfall Versicherung
Allgemeine Immobilien-Verwaltung
Brewo Grundstucksverwaltung
Union Suisse
Familia Lebensversicherung
Holdux
Pardux
Generali Sigorta

Generali Budapest Biztosito
Providencia Osztrak-Magyar Biztosito
Business Men's Assurance Company of America
Transocean Holding Corp.
Europ Assistance Worldwide Services
Gefina International N.V.
Holdux Curacao
Providencia Compania Argentina de Deguros
Providencia Compania de Seguro de Retiro
Generali do Brasil
Transocean do Brasil
Sao Marcos
Cia. Granadina de Seguros
Cia. Granadina de Seguros de Vida
Aseguradora General
Anglo Mexicana de Seguros
The Standard General Insurance Co.
Europ Assistance Worldwide Services (S.A.)
S.G.I. Properties

Companies affiliated with Assicuriazioni Generali, SPA are the following (at present it is unknown whether each of the companies listed herein have issued shares to the public):

Soc. Italiana Assicurazione Credit
Unione Italiana di Riassicurazione
C.G.M. International
Genercomit Distribuzione
Genercomit Gestione
Banca Internazionale Lombarda
Instituto Italiano di Credito Fondiario
Protos
Polis
Panditalia
RITA Cons. per la Rete Italiana Assicurativa

Servizi Technologici Avanzati
Sogeda
Sogeda Finanziaria
La Réunion Francise S.A.
La France I.A.R.D.
Midi Participations
SAI des Trois Collines de Mougins
Saint Christoly Bordeaux
Grand Bazar de Lyon
Société des Immeubles de Lyon
Saint-André Pey Berland
Sade Investisseurs
Soc. de Services Pour la Mémorisation des Documents
Telegos
L'Arthothéque
SAMSE
Credit Card Sentinel
Hambro Generali Fund Managers
Harris & Dixon IB (Jersey)
Helvetia Brand Nederland
Banco Vitalicio de Espana
B.N.P. - Generali, Entidad Gestora de Fondos de Pensiones
Banco di Roma (Belgio)
Emporiki Insurance Co.
Wiener Allianz Versicherung
Wiener Allianz Lebensversicherung
SK Verischerung
EBA Vermogensverwaltungsgesellschaft
RD-Beteiligung
CA-EA Investment
San Marco Investment
Interunfall-Leasing und Kreditvermittlung
CA-Generali Pensionskasse

CA-EA Pensionskassen-Studien und Beratung
Providentia - Soc. Suisse d'Assur. sur la Vie
Orion Rechtsschutz-Versicherung
Aegen International
George G. Zimmerman & Company
Hartford Line Slip
Federation Insurance Co. of Canada
Voyage Assistance International
Granja San Servolo
La Nacional
Seguros América
Europ Assistance De México
Compania de Seguros Atlas
U.S. Cap Insurance
Soc. d'Assistance et de Transport Médical
African Development Insurance
Leppard & Associates (Pty)
OTAS
Migdal Insurance Co.
World Marine & General Insurances

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STATEMENT OF THE CASE

This is a purely commercial breach of warranty action wherein Ethyl alleged that in 1986 and 1987, BP sold it an adulterated chemical compound for use in making a plastic film wrap for commercial food products. After making the wrap, Ethyl sold it to General Mills for use on Fruit Roll-Ups, a snack-food product.

The chemical compound was called Atmul 84K. This compound, although labeled Atmul 84K, was actually a concentrate containing Atmul 84K, B215, and LQA006, all in precise quantities prescribed by Ethyl. (R. 138). The "K" in Atmul 84K designated a kosher version of Atmul 84. (R. 347). Despite BP's reference to the product as "anti-fog" in its statement of the case, the record below does not reveal any non-food uses of a kosher chemical compound.

Ethyl purchased the Atmul 84K from BP pursuant to a contract which provided in part that:

> Seller [BP] warrants that the goods will conform to description and specifications and will be free from all defects in material and workmanship.

Pursuant to this purchase order, between July 1985 and January 1987, Ethyl purchased eight batches of Atmul 84K from BP.[4] (R. 85-86). The Atmul 84K consistently performed as tested and as intended, with one exception. That exception is a September 10, 1986 shipment of Atmul 84K which was contaminated with Tinuvin 770. (R. 312-13; 86-89).

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[4] Between 1981 and July 1, 1985, Ethyl purchased numerous batches of Atmul 84K from Reichold Chemical, BP's predecessor. (R. 267). On July 1, 1985, BP purchased Reichold and continued to sell Atmul 84K to Ethyl. (R. 85).

The aberrant September 10, 1986 shipment contained the Atmul 84K concentrate consisting of Atmul 84K, B215 and LQA006, but also contained Tinuvin 770. (R. 88-89). The Tinuvin 770 was a contaminant which rendered the concentrate defective and unsuitable for its intended use because it imparted an odor and off taste to the food product. (R. 86-87).

Contrary to BP's claims that Ethyl sold its film wrap to General Mills with certain written guarantees and that despite making these guarantees, Ethyl did not test its film wrap for off taste or odor and did not inform BP of the actual end use of its product, as the record below demonstrates, during the initial development of the film wrap, Atmul 84 was extensively studied and tested. By the time Ethyl decided to purchase commercial quantities of Atmul 84K from BP, the concentrate had undergone three testing procedures: 1) Ethyl's product development engineer's initial experiments with Atmul 84; 2) General Mills' independent testing of the experimental materials; and 3) Ethyl's final testing on the BP Atmul 84K concentrate itself. (R. 133, 137, 613-14). Each of these tests confirmed the propriety of Atmul 84K for its intended purpose -- film wrap for food products -- so long as the supplier provided the concentrate in an uncontaminated form.

In addition, as to BP's knowledge of the end use of its product, as the Eighth Circuit recognized, the parties disputed whether BP knew the compound would ultimately be used in food products.[5] (Pet. App. 3). However, the jury's findings of an express warranty along with a breach of that express warranty negate any assertion of lack of knowledge on the part of BP.

In 1987, after receiving complaints about the taste of some of the Fruit Roll-Ups, General Mills conducted a

---

[5] References to petitioner's appendix will be hereinafter referred to as "Pet. App."

nationwide recall of Fruit Roll-Ups. (R. 87). It was later determined that the taste problems were caused by the presence of Tinuvin 770 in the film wrap. It was also determined, and in fact eventually admitted by BP, that the Tinuvin 770 contaminant was improperly contained in raw materials provided by BP and used by Ethyl to produce the film wrap. (R. 499-500). General Mills subsequently sued Ethyl. (R. 87).

Ethyl settled the General Mills lawsuit on July 5, 1989 for $8,960,000. (R. 88). Shortly thereafter, Ethyl sued BP on a variety of claims, including breach of express warranty, for providing it with a contaminated chemical compound. Ethyl sought damages from BP for all sums paid to General Mills, as well as damages for loss of revenue, loss of business advantage, costs and attorneys' fees. (Pet. App. 3).

Prior to trial, BP moved for summary judgment on all of Ethyl's claims against it. In response, the district court determined that the negligence and strict liability claims "sound in economic loss, and that the nature of the claimed loss is better resolved by the application of contract law than tort law." (Pet. App. 3). Consequently, it dismissed Ethyl's negligence and strict liability claims. Only Commercial Code issues of contract and warranty remained for trial.

Following the district court's order on the summary judgment motion, BP moved the district court for clarification of the prior ruling, asking it to hold that Ethyl's warranty claims were subject to the Iowa Comparative Fault Act or, alternatively, to certify the issue to the Iowa Supreme Court. In urging the application of the Comparative Fault Act to Ethyl's warranty claims, BP represented as follows:

> While the Court can, by employing a special verdict form, prevent or protect against the possibility that comparative fault will be later overturned on appeal, if the Court refused to submit comparative fault to

> the jury, and was later reversed, the only remedy would be a new trial.

(Resp. App. 12, n.4).[6]

The district court ultimately determined that the Iowa Comparative Fault Act applied to plaintiff's claims. It then denied the motion for certification without comment.

Prior to trial the parties entered into certain stipulations of fact. Two stipulated facts are particularly significant. First, BP stipulated to Ethyl's claimed damages in the amount of $9,367,000.00. Second, BP stipulated that it was the source of the Tinuvin 770 contamination. (R. 499-500). Thus, at trial, it was undisputed that BP caused the Tinuvin 770 contamination and that Ethyl's damages were at least $9,367,000.00.

When the case proceeded to trial, BP disavowed any knowledge that the Atmul 84K that it provided to Ethyl was to be incorporated into products intended for food use and, instead, portrayed Ethyl as the source of its own problems. The jury found to the contrary.

BP asserted and the district court instructed the jury on two theories of comparative fault: 1) that Ethyl failed to test the BP product or its product prior to sale to General Mills; and 2) that Ethyl failed to follow the law, Ethyl's own policy and industry custom by failing to obtain an FDA letter from BP before giving similar assurances to General Mills about FDA status and direct food application of its film wrap. (Pet. App. 12-13). Both of these theories were dependent upon a finding that BP was not aware of the end use of its product.

At the close of trial, the district court gave several substantive instructions to the jury, including on the issue of

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[6] References to respondents' appendix will be hereinafter referred to as "Resp. App."

damages. Specifically with respect to damages, the district instructed that:

> If you should find by a preponderance of the evidence that plaintiffs have been damaged, you may award them only such damages as will reasonably compensate and only such damages as you find they sustained as a proximate result of BP's alleged wrongful conduct.
>
> Beyond the purchase price paid by Ethyl for the BP product purchased in 1986, all of plaintiff's claims are for incidental and consequential damages. Consequential damages are those damages relating to any loss resulting from general or particular requirements or needs of the buyer which the seller had reason to know of at the time of contracting and which could not be reasonably prevented by the buyer. The particular needs of the buyer must be made known to the seller while general needs may be inferred from the circumstances.
>
> Any incidental and consequential damages you award must be foreseeable or have been reasonably foreseen at the time the parties entered into their contract.

(Pet. App. 10; R. 1820-21) (emphasis added).

Ultimately, the jury returned a verdict finding that BP had made an express warranty to provide specified materials free of contamination, BP had materially breached that warranty by providing contaminated materials, and that BP was a proximate cause of Ethyl's damages. (Pet. App. 14-15). In response to Interrogatory No. 4, the jury also found that plaintiff's damages were $9,367,000.00. (Pet. App. 15). For the damages to have been foreseeable under the damage

instruction quoted above, the jury must have determined that BP had reason to know that the Atmul 84K was to be used with food products and that the loss could not reasonably have been prevented by Ethyl. Thus, BP's claim that the jury found only that Ethyl was a cause -- not the cause of damages to Ethyl -- and that the stipulated damages of $9,367,000.00 reflect only those damages without reduction for fault, is unsupported.

Despite the purely contractual nature of the claims, which sought damages for economic loss alone, over Ethyl's objection, the jury was asked to apportion fault between Ethyl and BP for Ethyl's damages. The jury apportioned 30% of the fault to BP and 70% of the fault to Ethyl. (Pet. App. 16). Because Ethyl's fault was greater than that of BP, the court ordered judgment in favor of BP and dismissed the case.

Following post-trial motions, Ethyl and its insurers appealed the judgment in BP's favor and the denial of post-trial motions. As to the merits of the appeal, Ethyl argued, among other things, that the Iowa Comparative Fault Act did not apply to Ethyl's breach of warranty claims. Because the Eighth Circuit determined that the district court had committed error in applying the Iowa Act to Ethyl's claim, it did not reach Ethyl's remaining arguments. (Pet. App. 6).

BP's pretrial request to the district court for a special verdict form addressing comparative fault ultimately foreshadowed the Eighth Circuit's ruling. The Eighth Circuit reversed the district court's judgment, and remanded the case to the district court with directions to enter judgment of $9,367,000.00 in Ethyl's favor. (Pet. App. 6-7).

SUMMARY OF ARGUMENT

After determining that the Iowa Comparative Fault Act was inapplicable to Ethyl's claims, the Eighth Circuit Court of Appeals reversed the district court's judgment and remanded

the case with directions to enter judgment in Ethyl's favor. It did so based on the jury's express findings in favor of Ethyl on each element of Ethyl's claim against BP.

The applicability of the Iowa Comparative Fault Act to a commercial breach of warranty case is solely a state law issue which does not warrant review by this Court. Similarly, BP's claim that the Eighth Circuit's decision ordering entry of judgment in favor of Ethyl rather than a new trial does not conflict with decisions in other circuits, does not implicate the Fifth or Seventh Amendments in any way and does not depart from the accepted and usual course of judicial proceedings so as to require an exercise of this Court's power of supervision. BP's petition does not satisfy the criteria for certiorari and, therefore, should be denied.

ARGUMENT

BP's Petition Does Not Satisfy the Criteria for Certiorari.

Rule 10.1, U.S. Sup. Ct. R., provides in part that:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state "of last resort"; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned

such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

BP's petition is based on the claims that: a) the Eighth Circuit's disposition of this case creates an irreconcilable conflict with decisions in the Tenth Circuit and other circuits; b) the Eighth Circuit's disposition of this case raises questions of fundamental importance relating to Due Process and the Seventh Amendment; and c) the Eighth Circuit's disposition of this case departs from the accepted and usual course of judicial proceedings and requires an exercise of this Court's power of supervision. None of these claims warrants review by this Court.

A. The Eighth Circuit's Disposition of This Case Does Not Create an Irreconcilable Conflict With Decisions in the Tenth Circuit and Other Circuits.

Citing two Tenth Circuit cases, Jackson State Bank v. King, 992 F.2d 256 (10th Cir. 1993) and Zierke v. Agri-Systems, 992 F.2d 276 (10th Cir. 1993), and a single First Circuit case, Pratico v. Portland Terminal Company, 783 F.2d 255, 268 (1st Cir. 1985), BP claims that the Eighth Circuit's disposition of this case creates an irreconcilable conflict with decisions among the Circuits.[7] However, as this Court has stated:

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[7] It is noteworthy that, until BP's petition to the Eighth Circuit for rehearing, BP had failed to cite any authority to the Eighth Circuit in support of its position that, in the event that the Eighth Circuit determined that the Iowa Comparative Fault Act did not apply to Ethyl's claims, then Ethyl was entitled to a new trial but not judgment in its favor. The reason for this omission is clear. The cases BP now relies upon in fact supported Ethyl's position that the Iowa Comparative Fault Act does not apply to purely commercial breach of contract cases. See, e.g., Jackson State Bank v. King, 992 F.2d 256, 257 (10th Cir. 1993) (because plaintiff's claims were

> A principal purpose for which [the United States Supreme Court] use[s its] certiorari jurisdiction...is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of the provisions of federal law.

Braxton v. U.S., 500 U.S. 390, 391 (1991) (emphasis added). Here, however, the principal issue in dispute is not the meaning of a provision of federal law; the issue in dispute is the applicability of the Iowa Comparative Fault Act to a purely commercial breach of warranty case, a strictly state law issue.

BP's claim that the Eighth Circuit's decision in this case ordering entry of judgment in favor of Ethyl rather than a new trial conflicts with Tenth Circuit and First Circuit decisions on the proper disposition of cases is similarly misguided. These cases do not conflict with the Eighth Circuit's decision in any manner, let alone "on the same matter" or with respect to a "federal question" as required to invoke the Supreme Court's certiorari jurisdiction. U.S. Sup. Ct. R. 10.1(a).

In each of the cases BP cites, the Circuit Court was unable to discern the basis of the jury's determination of liability or damages from the jury's answers to special interrogatories or the verdict, necessitating a new trial. Jackson State Bank v. King, 992 F.2d 256, 258 (10th Cir. 1993) ("There is no way to discern from the jury's answers to the special interrogatories whether the damages were calculated properly"); Zierke v. Agri-Systems, 992 F.2d 276, 279 (10th Cir. 1993) ("The matter is further complicated because the special interrogatories did not specifically inquire

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contractual in nature, the application of the comparative negligence statute was incorrect); Little Rock Electrical Contractors v. Okonite Co., 294 Ark. 399, 402-03, 744 S.W.2d 381, 383 (1988) (jury improperly instructed to apply comparative fault principles in breach of warranty case).

as to whether the fault ascribed to plaintiff was in the nature of assumption of risk or simply a form of negligence....Therefore, we remand the case for a new trial on the issue of strict liability, with jury instructions that state current Wyoming law and interrogatories that specifically inquire as to whether John Zierke assumed a risk"); Pratico v. Portland Terminal Company, 783 F.2d 255, 268 (1st Cir. 1985) ("The basis of a restoration of the amount deducted below for contributory negligence, however, would be a finding that the defendant violated the OSHA regulation and that this violation caused plaintiff's injury. Such a finding was never made by the jury below because all testimony concerning the OSHA regulations was struck from the record"). This is not such a case.

This is a purely commercial breach of contract/warranty action wherein Ethyl alleged that BP sold it an adulterated compound for use in making a plastic film wrap that was later sold to General Mills and used in its Fruit Roll-Ups. Following trial, the jury was instructed on all substantive issues. BP objected to none of these instructions. The jury returned a verdict expressly finding that BP had made an express warranty, had breached that warranty, and had thereby caused Ethyl damages of $9,367,000.00.

BP does not dispute that the jury expressly found that BP had made an express warranty and had breached that warranty. Instead, it recharacterizes the jury's findings to fit a self-invented legal theory of "predominate [sic]" cause to replace the traditional legal concept of proximate cause, but to no avail. As the jury was instructed:

> Damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the damage, and that the damage was either a direct result or a

> reasonably probable consequence of the act or omission.
>
> This does not mean that the law recognizes only one proximate cause of damage, consisting of only one factor or thing, or the conduct of only one actor. On the contrary, many factors or things, or the conduct of two or more actors, may operate at the same time, either independently or together, to cause damage; and in such a case, each may be a proximate cause.

(Pet. App. 12; R. 1825). Thus, it can only be concluded from the jury's answer to Interrogatory No. 3[8] that BP's acts or omissions "played a substantial part in bringing about or actually causing the damage, and that the damage was either a direct result or a reasonably probable consequence of the act or omission."

Similarly, on the damage question, the jury found that Ethyl's damages were $9,367,000.00, as it was required to do.[9] Indeed, BP stipulated that Ethyl was damaged at least in the sum of $9,367,000.00. Moreover, the jury was specifically

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[8] Interrogatory number 3 and the jury's answer state:

> Was [BP's] breach a proximate cause of damage to [Ethyl]?
>
> Yes [X] No [ ]

(Pet. App. 15).

[9] Interrogatory number 4 and the jury's answer state:

> Making no reduction in fault, if any, you may attribute to plaintiff Ethyl, what are plaintiff's total damages? $9,367,000.00

(Pet. App. 15).

instructed that it could award only such damages as it found Ethyl "sustained as a proximate result of BP's alleged wrongful conduct." (Pet. App. 10). Thus, again, it can only be concluded that the jury properly awarded the stipulated damages of $9,367,000.00, damages which BP "had reason to know of at the time of contracting" and "which could not be reasonably prevented by [Ethyl]." (Pet. App. 10).

As the Eighth Circuit recognized, "the jury...found BP materially breached the express warranty and proximately caused Ethyl to incur $9,367,000.00 in damages." (Pet. App. 3). In the face of these clear jury answers, the proper disposition of the case was reversal and judgment in Ethyl's favor.

The disposition of this case does not create an irreconcilable conflict with cases in the Tenth Circuit, First Circuit or any other Circuit. BP has not satisfied the criteria for certiorari, and its petition should be denied.

B. The Eighth Circuit's Disposition of This Case Does Not Raise Questions of Fundamental Importance Relating to Due Process or the Seventh Amendment.

Without ever acknowledging that it expressly requested the special verdict form it now challenges, BP essentially claims that the district court's use of a special verdict form precludes any disposition of the case other than a new trial as violative of the Fifth and Seventh Amendments. These claims do not withstand more than a moment's scrutiny.

In urging the application of the Iowa Comparative Fault Act to Ethyl's warranty claims, BP represented the following:

> While the Court can, by employing a special verdict form, prevent or protect against the possibility that comparative fault will be later overturned on appeal,

> if the Court refused to submit comparative fault to the jury, and was later reversed, the only remedy would be a new trial.

(Resp. App. 12, n.4). BP received precisely what it requested. It is well settled that a party may not ask an appellate court to correct an error which that party persuaded the trial court to commit. United States ex rel. Brown v. City of Memphis, 97 U.S. 284, 292 (1877) (party cannot complain in appellate court of an order made at its request); New York Elevator R. Co. v. Fifth National Bank, 135 U.S. 432, 441-42 (1889) (party who procures ruling under which trial is conducted waives right to object to it).

The Eighth Circuit's disposition of this case is a textbook example of the purpose of Rule 49, Fed. R. Civ. P., which allows the use of a special verdict form in the discretion of the district court. One important practical advantage of the special verdict is that it increases judicial efficiency by reducing the occasions on which new trials must be had:

> [I]f the trial judge misapplies the law to the special verdict, he may correct his error without the necessity of a new trial. And of outstanding importance is the fact that the definite factual findings furnish a practical, concrete basis for the appellate court's evaluation of the case on review. If the only error involves a point of law or a misapplication of law to the facts by the trial judge, the necessity for a new trial should be eliminated.

Wright and Miller, 9 Federal Practice and Procedure: Civil § 2505, 494 (1971) (emphasis added).

The special verdict is particularly valuable in areas where the law is uncertain or in the process of development. Any errors in a case will not require a new trial because special

verdicts will have made it clear whether they had any effect on the result. Id. at 495; see also Thrash v. O'Donnell, 448 F.2d 886, 890 (5th Cir. 1971). These rationales directly apply to this case.

As the Eighth Circuit recognized, it could bring this case to an end without the waste of another trial. This is because, at BP's insistence, the district court carefully constructed a charge with special interrogatories which resolved the fact issues and thus enabled the appellate court, by determining the legal significance thereof, to translate the verdict into the appropriate judgment. See, e.g., Mills v. Mitsubishi Shipping Co., 358 F.2d 609, 610 (5th Cir. 1966).

The Eighth Circuit's disposition of this case does not implicate the Fifth or Seventh Amendments in any way. Citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965), BP claims that it "received no meaningful review of the facts under the applicable law." (Petition at 18). This claim is absurd. In Armstrong, a divorced mother and her new husband completed adoption proceedings of a child from the mother's first marriage without providing notice to the child's actual father. Here, BP received an eight-day jury trial in the United States District Court for the Northern District of Iowa and plenary review of the District Court judgment in the Eighth Circuit. Unlike the petitioner in Armstrong, BP certainly was heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545,552 (1965).

Similarly, BP's reliance on Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines Ltd., 369 U.S. 355 (1962), for the proposition that the Eighth Circuit re-examined and rejected the jury's determination of facts is misguided. Unlike the lower court in Atlantic & Gulf Stevedores, Inc., the Eighth Circuit did not ignore express findings of the jury. On the contrary, the Eighth Circuit's decision merely gave effect to all of the jury's legally relevant answers to the special interrogatories BP requested while disregarding the one legally

irrelevant answer. The Eighth Circuit accordingly followed this Court's instructions in Atlantic & Gulf Stevedores, Inc. that "[w]here there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." Id. at 364.

The jury found in favor of Ethyl on each of the elements comprising its claim against BP. There is no constitutional ground for BP's request for certiorari and, therefore, its petition should be denied.

C. The Eighth Circuit's Disposition of This Case Neither Departs From the Accepted and Usual Course of Judicial Proceedings Nor Requires an Exercise of This Court's Power of Supervision.

BP claims in the most conclusory fashion that erroneous instructions are presumptively injurious, that the district court's ruling that the Iowa Act applied to Ethyl's claims and its concomitant instruction to the jury were error, and that this alleged error requires an exercise of this Court's supervisory power to correct. However, BP did not object to these challenged instructions or rulings and, in fact, requested them. These facts alone preclude review.

Moreover, the alternative instructions BP proposes are essentially identical to those instructions actually given. For example, BP claims that if comparative fault had been ruled inapplicable prior to trial, then the case would have been tried and instructed under the principles of Iowa's Commercial Code. The jury would then have been instructed that any consequential damages must be shown to have been the result of defendant seller's alleged breach of warranty and that a plaintiff's consequential damages would not include any damages of which the defendant seller had no reason to know and which the plaintiff could not have otherwise reasonably prevented. (Petition at 21). However, as the damages

instruction given in this case demonstrates, the jury was instructed both that it could award only such damages as it found Ethyl "sustained as a proximate result of BP's alleged wrongful conduct," and that "consequential damages are those damages relating to any loss resulting from general or particular requirements or needs of the buyer which the seller had reason to know of at the time of contracting and which could not have been reasonably prevented by the buyer." (Pet. App. 10).

Similarly, citing no authority, BP claims that in lieu of apportioning fault, the district court would have instructed the jury to determine the extent to which factors other than BP's breach -- especially Ethyl's own acts or omissions -- proximately caused the consequential damages claimed. (Petition at 21). However, again, the jury was specifically instructed that consequential damages included only those damages which could not be reasonably prevented by the buyer, that is, Ethyl.

The jury found in favor of Ethyl on each of the elements of its claim against BP. It did so under instructions which provided the jury with an understanding of the issues and its duty to decide those issues. The instructions did not mislead the jury in any way. The Eighth Circuit's disposition of this case neither departs from the accepted and usual course of judicial proceedings nor requires an exercise of this Court's power of supervision.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Dated: January 20, 1995 Respectfully submitted,

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[Table of Contents] (i) and [Table of Authorities] (ii) have been omitted.]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

ETHYL CORPORATION,

Plaintiff,

vs.

BP PERFORMANCE POLYMERS, INC.,

Defendant.

File Nos. C-90-2064
C-90-2072

DEFENDANT'S NOTICE OF MOTION AND MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION OF A QUESTION OF LAW
(oral argument requested)

PLEASE TAKE NOTICE that defendant BP Performance Polymers, Inc. ("BP") hereby moves the Court for clarification of the Court's ruling an BP's previous motion for summary Judgment specifically on the claims of plaintiff Ethyl Corporation ("Ethyl") for breach of express and implied warranties. BP contends that Ethyl's warranty claims are subject to comparative fault and therefore moves the Court for a ruling to that effect prior to trial. In the alternative, BP hereby moves the court, pursuant to Local Rule 23, for certification to the Iowa supreme court, the following question of law:

Whether Iowa's comparative fault statute, Iowa Coda § 668.1 ff (1987), applies to claims or defenses based on breach of express or implied warranties?

This Motion is based upon all the files, records, and proceedings herein, including BP's Memorandum in support of its Motion served and filed herewith, and upon all of the matters previously submitted to the court on BP's Summary Judgment Motion.

BP respectfully requests oral argument by telephone on this motion pursuant to Local Rule 14(c).

Dated this 28th day of July, 1992.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

ETHYL CORPORATION,

Plaintiff,

vs.

BP PERFORMANCE POLYMERS, INC.,

Defendant.

File Nos. C-90-2064
C-90-2072

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION OF A QUESTION OF LAW

Defendant BP Performance Polymers, Inc. submits this memorandum in support of its Motion For Clarification Or, In The Alternative, For Certification Of A Question of Law pursuant to this Court's Local Rule 23.

INTRODUCTION

In February, 1992, Defendant BP Performance Polymers ("BP") brought a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure seeking to dismiss all counts of the Complaint filed by plaintiff Ethyl Corporation ("Ethyl") in this consolidated action. Numerous legal issues were raised and briefed by the parties, and the Court, upon considering the matter without oral

argument, filed an order on July 8, 1992, granting summary judgment as to Ethyl's negligence and strict liability claims, and denying summary judgment as to Ethyl's remaining claims of breach of contract and breach of express and implied warranties ("July 8 Order").

However, the Court's July 8 Order leaves unresolved an issue disputed by the parties and of critical importance to the scope and outcome of this matter: whether Ethyl's claims for breach of express or implied warranty are subject to comparative fault under Iowa law. The Court's July 8 Order indicates that implied warranty claims can be the subject of indemnity and that if Ethyl wishes to seek indemnity on the breach of contract and breach of warranty claims alleged, it may do so. However, the Court's order does not specifically address the application of comparative fault to Ethyl's warranty claims. Because of the potential impact on the scope of issues to be presented and determined by the jury at trial in this case, BP seeks clarification from the Court or, in the alternative, a certification to the Iowa Supreme Court on the following question of law:

> Whether Ethyl's claims of breach of express and implied warranty are subject to comparative fault under Iowa law?

Resolution of this issue now will avoid repeated disagreements over evidentiary issues, the special verdict form, and the Court's jury instructions, as well as provide more certainty to the parties in preparing this case for trial. It may even reduce the likelihood of a reversal on appeal after trial. BP and Ethyl both recognize the role of comparative fault as a legitimate issue for pre-trial resolution.[1] In light of the pivotal

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[1] In the Proposed Pre-trial Order submitted by the parties on July 23, 1992, both BP and Ethyl state as legal issues to be resolved whether comparative fault applies to Ethyl's warranty claims. In fact, over BP's

nature of this issue, the Court should clarify its prior Order to address the applicability of comparative fault or, alternatively, certify this question to the Iowa Supreme Court pursuant to Local Rule 23 and Iowa Code § 684A.

ARGUMENT

I. THE COURT SHOULD RULE THAT ETHYL'S CLAIMS FOR BREACH OF EXPRESS AND IMPLIED WARRANTIES ARE SUBJECT TO COMPARATIVE FAULT ANALYSIS.

BP's position in its original summary judgment motion was that Iowa Code § 668.1 ff (1984) applies to Ethyl's claims of breach of warranty. See, BP's Memorandum In Support Of Summary Judgment (hereinafter "BP's Memo") at p. 12. The plain statutory language of Iowa's Comparative Fault Statute includes breach of warranty in the definition of conduct constituting "fault" governed by the statute. The Iowa legislature's intent is clear. Under the circumstances, it would be improper for a court to contract or expand the statutory definitions. Compare Tratchel v. Essex Group, Inc., 452 N.W.2d 171, 180-81 (Iowa 1990) (court refused to expand clear statutory definition to include fraud as basis for comparative fault where fraud is not mentioned in statutory definition of "fault").

Indeed, numerous recent decisions from the Iowa Supreme Court show that Iowa trial courts are applying comparative fault to breach of warranty claims. Cases decided after the effective date of Iowa's comparative fault statute

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objection, Ethyl has included in the Appendix to the Pre-trial Order its legal argument on the issue of whether comparative fault should apply. While the Court may properly direct a further briefing schedule for the parties on BP's present Motion, BP addresses below points raised by Ethyl's legal argument.

show that Iowa courts are construing breach of warranty claims in accordance with the legislature's expressed intent.[2] See, Renze Hybrids, Inc. v. Shell Oil Co., 418 N.W.2d 634, 641 (Iowa 1988).

For example, In Renze Hybrids, a product defect case, the only two theories of relief pleaded were breach of the implied warranties of merchantability and of fitness for a particular purpose. The trial court applied the Iowa comparative fault statute and, upon instruction, the jury found that the defendant was 75% at fault for plaintiff's damages. The trial court therefore entered a judgment in favor of plaintiff and against defendant for 75% of the full damages found by the jury. On appeal, the Iowa Supreme Court affirmed the trial court's reduction for plaintiff's comparative fault. Id., at 637, 641.

Other reported Iowa decisions show that Iowa courts apply comparative fault principles to cases involving breach of warranty. See, Meier v. Alfa-Laval, Inc., 454 N.W.2d 576, 578 (Iowa 1990) (claims of breach of implied warranty of fitness for a particular purpose and negligent misrepresentation made subject to comparative fault; court reduced damages by amount of plaintiff's fault); Hillrichs v. Avco Corp., 478 N.W.2d 70, 72 (Iowa 1991) (injured farmer's claims against manufacturer based on strict liability, breach of implied warranty, and negligence in designing corn picker were submitted to and decided by jury on comparative fault basis).

The only cases cited by Ethyl against the application of comparative fault pre-date Iowa's enactment of its comparative fault statute. See e.g., Ethyl's Memorandum of Law in Opposition to Defendant's [Summary Judgment] Motion, at pp. 6 - 15. These cases are therefore inapposite

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[2] Iowa enacted its Comparative Fault Statute (Iowa Code § 668.1 ff) in 1984 and it applies only to cases filed after July 1, 1984. The Statute applies in this case since Ethyl originally commenced this action in Iowa state court in August 1990.

and inconsistent with more recent Iowa case law. In keeping with the clear and unambiguous language of Iowa's comparative fault statute, and recent Iowa case law, this Court should rule that comparative fault applies to Ethyl's breach of warranty claims. The issue of Ethyl's comparative fault should therefore be resolved by the jury.

A. Ethyl's Mere Characterization of its Warranty Claims as Seeking Indeminification Does Not Prevent Application of Iowa's Comparative Fault Statute.

At summary judgment, Ethyl's position was that it was seeking full indemnity from BP for damages it incurred by reason of its own liability to General Mills. However, that Ethyl labels its action as one for indemnity does not make it so. Moreover, neither Ethyl's contentions nor its cited authority justify ignoring the operation of Iowa's comparative fault statute in this case.

In the July 8 Order, the Court recognized that indemnity is essentially equitable in nature, citing Howell v. River Products Co., 379 N.W. 919, 921 (Iowa App. 1986). Howell was not a case involving breach of warranty, but rather breach of a professional services contract. Moreover, given the adoption of Iowa's Comparative Fault Statute (subsequent to the Howell decision), reliance upon the holding in Howell to bar application of comparative fault is misplaced.

The Court in Howell recited several general propositions regarding claims and defenses for indemnity, including the general principle that indemnity exists for one who discharges a duty which "as between himself and another should have been discharged by the other, . . . unless the payor (indemnitee) is barred by the wrongful nature of its conduct." Howell, 379 N.W.2d at 921 (citing 41 Am. Jur. 2d Indemnity § 2, at 688 (1968) (emphasis added). The court in Howell found no evidence of any fault by plaintiff and

therefore no "necessity to examine the legal question of the applicability of comparative fault to indemnity cases. . ." Id., at 921.

Comparative fault as applied in Iowa recognizes that indemnity is not available to persons such as Ethyl whose own wrongful conduct is, in whole or in part, responsible for their own liability. Active-passive negligence, formerly recognized as a basis for indemnity in Iowa, has been specifically abolished following adoption of Iowa's comparative fault statute. None of the other traditional common law bases for indemnity apply to the relationship of BP and Ethyl. See, American Trust & Savings v. U.S. Fidelity, 439 N.W.2d 188, 190 (Iowa 1990), and BP's Memo, pp. 8-11.

The other cases cited and discussed by the Court also pre-date the Iowa Comparative Fault Statute. See, Peters v. Lyons, 168 N.W.2d 759 (Iowa 1969); Farmers Co-op v. Stockdale's Corp., 366 N.W.2d 184, 166 (Iowa 1985). Peters is a case involving a dog bite and broken dog chain. There is no doubt as to how Peters, a personal injury case, would be decided under Iowa's modern comparative fault scheme. The fault of the parties (the dog owner's strict liability and the dog chain seller's breach of warranty), along with any negligence attributable to the plaintiff, if any, would be apportioned and damages awarded accordingly. Similarly, in Farmers Co-op, after specifically noting that "no claim involving comparative fault is raised or considered," the court simply set forth and applied the general bases on which Iowa law recognizes claims for indemnity. Farmers Co-op, 366 N.W.2d at 186.

None of the authority addressing indemnity claims bars application of comparative fault, and BP seeks an Order ruling that comparative fault does apply to Ethyl's claims of breach of warranty.

B. Ethyl's Recent Arguments Age Similarly Inappositive.

Over BP's objection, Ethyl has submitted a memorandum as part of its legal contentions in the Pre-Trial Order, claiming that comparative fault does not apply in this case.3 However, Ethyl fails to acknowledge the fact that breach of warranty is specifically included in the definition of fault and instead relies upon irrelevant, uncontrolling case law.

First, plaintiff cites Hoover's Hatchery, Inc. v. Utgaard, 447 N.W.2d 684 (Iowa App. 1989). Hoover's did not involve any claims for breach of warranty. Instead, the plaintiff's claim was for breach of a requirements contract. Hoover's 447 N.W.2d at 685. Significantly, the Iowa Court of Appeals accepted the defendant's contention and the trial court's ruling that the plaintiff had failed to mitigate its damages upon defendant's breach of the requirements contract and therefore reduced the plaintiff's damages by 70% based on plaintiff's conduct following the sale. Id. at 688-89. Nothing in the language or result in suggests that breach of warranty claims are not subject to Iowa's Comparative Fault Statute.

Second, Ethyl cites to a case decided under Illinois law, See, Blommer Chocolate Co. v. Bongards Creameries, Inc., 635 F. Supp. 911, 635 P. Supp. 919 (N.D. Ill. 1986) ("Blommer I"); later decision, 644 F. Supp. 234 (N.D. Ill. 1986) ("Blommer II"). In Blommer II, the district court rejected the defendant's claim that comparative fault should apply based on the failure of plaintiff, a food manufacturer, to discover defects in dried whey powder purchased from defendant. Blommer II was not decided under Iowa law, and

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[3] Ethyl's inclusion of comparative fault as a legal issue concedes the necessity of BP's present motion and the Court's resolution of this issue prior to trial. Also, while Ethyl's legal memorandum goes on to discuss why Ethyl claims to be without fault, BP presently addresses only the fundamental issue: should comparative fault apply? If so, the extent of Ethyl's fault is a matter for the trier of the fact.

is not precedent for the issue of whether to apply Iowa's Comparative Fault Statute. Moreover, the case is factually distinguishable. The defendant in Blommer II supplied the dried whey powder with an unequivocal written guarantee that the whey was salmonella-free. In light of this fact, the court in Blommer II held that the purchaser was entitled to rely upon the defendant's express written guarantee. See, Blommer II, 644 F. Supp. at 238. The court in Blommers I and II found no facts which could support liability for the plaintiffs food manufacturer for failure to detect salmonella. In contrast, in this case there remain disputed issues of material fact as to whether BP made or breached any warranties and as to Ethyl's conduct. In any event, Blommer II does not stand for the proposition that the issue of comparative fault should be taken from the jury merely because the plaintiff alleges a right to full indemnity.

The decisions in Hoover's and Blommers I and II do not control Ethyl's warranty claims or BP's defenses based upon comparative fault. Accordingly, at the trial of this matter, BP will introduce evidence and seek an instruction and a special verdict including regarding BP's defense of comparative fault, i.e. that Ethyl's fault in whole or in part caused its liability to General Mills.

II. THIS COURT AND IOWA STATE LAW PROVIDE FOR CERTIFYING CONTROLLING QUESTIONS OF LAW.

This Court's Local Rule 23 and Iowa's Uniform Certification of Questions Act specifically authorize motions for certification from this Federal District Court to the Iowa Supreme Court. See, Local Rule 23; Iowa Code § 684A. Rule 23 permits certification of controlling questions of law to the highest state court under appropriate circumstances. BP submits that this Court has the authority to rule on the

question of law presented in this motion, and the plain statutory language and subsequent reported Iowa decisions show that BP's defense of comparative fault should be submitted to the jury on Ethyl's various warranty claims. Alternatively, if the Court is reluctant to decide that comparative fault applies, each of the necessary circumstances exist in this case to certify the issue to the Iowa Supreme Court. First, BP presents a purely legal question for resolution. Second, this legal question may be determinative of the course of action in that it significantly affects the need for certain witnesses, exhibits, jury instructions and deliberations.[4] Third, the issue is obviously disputed given Ethyl's claim that Comparative Fault does not apply. Ethyl's position contradicts the plain statutory language of Iowa Code § 668 and is unsupported by any controlling Iowa case law.

Accordingly, in the interest of judicial economy, the Court should act now to reconsider and clarify its previous summary judgment ruling regarding comparative fault or, in the alternative, certify this disputed question of law to the Iowa Supreme Court.

CONCLUSION

For all the foregoing reasons, defendant BP Performance Polymers, Inc. respectfully requests that the Court enter an order clarifying its summary judgment ruling as to Ethyl's breach of express and implied warranty claims and find specifically that Iowa's comparative fault statute applies to those claims or, in the alternative, certify the questions of law raised in this motion for review by the Iowa Supreme Court.

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[4] While the Court can, by employing a special verdict form, prevent or protect against the possibility that comparative fault will be later overturned on appeal, if the Court refused to submit comparative fault to the jury, and was later reversed, the only remedy would be a new trial.

Respectfully Submitted,

Dated: July 28, 1992.

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